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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

144136

STERVEN B. LUDWIG, CLERK
U.S. DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF INDIANA

UNITED STATES OF AMERICA

Plaintiff,

v.

DAVID B. FISHER, et al.

Defendants.

Civil No. S92-00636M

Hon. Robert L. Miller, Jr.

CONSENT DECREE

I. BACKGROUND

A. The United States of America (United States), on behalf of the Administrator of the United States Environmental Protection Agency (EPA), filed a complaint in this matter pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607, as amended (CERCLA), seeking reimbursement of response costs incurred for response actions taken at or in connection with the release or threatened release of hazardous substances at the Fisher-Calo Site in La Porte County, Indiana (the Site).

B. As a result of the release or threatened release of hazardous substances into the environment, EPA has undertaken response actions at the Site under Section 104 of CERCLA, 42 U.S.C. § 9604. In performing these response actions, EPA has incurred response costs at or in connection with the Site.

C. Pursuant to Section 105 of CERCLA 42 U.S.C. § 9605, EPA placed the Site on the National Priorities List (NPL) by publication in the Federal Register on September 8, 1983, 48 Fed. Reg. 40658, 40671. In April 1985, EPA undertook to conduct a fund-lead Remedial Investigation (RI) and Feasibility Study (FS)

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at the Site. The RI was completed in May 1989 and FS in April 1990.

D. A proposed plan was issued for the Site on April 13, 1990. After review of the comments received, the Regional Administrator for Region 5 signed a Record of Decision on August 7, 1990, for the Site. The ROD called for the remediation of soils and groundwater, fencing of those portions of the Site being remediated, and additional investigation of contamination on certain portions of the Site.

E. In its action, the United States alleges that each of the Settling Defendants is a potentially responsible party and that pursuant to 42 U.S.C. § 9607(a), each is jointly and severally liable for the United States' response costs incurred in connection with the Site. The Settling Defendants have each filed answers to the complaint in which they have denied liability.

F. Akzo Coatings, Inc. and The O'Brien Corporation (the "Settling Defendants") do not admit any liability to Plaintiff arising out of the transactions or occurrences alleged in the complaint.

G. The United States and Settling Defendants agree, and this Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith, that settlement of this matter will avoid further prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

THEREFORE, with the consent of the Parties to this Decree, it is ORDERED, ADJUDGED, AND DECREED:

II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345 and 42 U.S.C. §§ 9607 and 9613(b). This Court also has personal jurisdiction over the Settling Defendants. Solely for the purposes of this Consent Decree and the underlying Complaint, the Settling Defendants waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this District. The Settling Defendants shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

III. PARTIES BOUND

2. This Consent Decree is binding upon the United States, and upon Settling Defendants and their successors and assigns. Any change in ownership or corporate or other legal status, including but not limited to, any transfer of assets or real or personal property, shall in no way alter the status or responsibilities of Settling Defendants under this Consent Decree.

IV. DEFINITIONS

3. Unless otherwise expressly provided herein, terms used in this Consent Decree that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or in any appendix attached hereto the following definitions shall apply:

a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, et seq.

b. "Consent Decree" or "Decree" shall mean this Consent Decree and all appendices attached hereto. In the event of conflict between this Consent Decree and any appendix, the Consent Decree shall control.

c. "Day" shall mean a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

d. "DOJ" shall mean the United States Department of Justice and any successor departments, agencies or instrumentalities of the United States.

e. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities of the United States.

f. "EPA Hazardous Substance Superfund" shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.

g. "Interest" shall mean interest at the current rate specified for interest on investments of the Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a).

h. "Paragraph" shall mean a portion of this Consent Decree identified by an arabic numeral or an upper or lower case letter.

i. "Parties" shall mean the United States and the Settling Defendants.

j. "Past Response Costs" shall mean all costs incurred by EPA and DOJ in connection with the Site through the date of entry of this Consent Decree including, but not limited to:

direct and indirect costs, costs reimbursed to the State for the Site, and interest accrued on all such costs.

k. "Record of Decision" or "ROD" shall mean the EPA Record of Decision relating to the Site signed on August 7, 1990 by the Regional Administrator, EPA Region V, including all attachments thereto.

l. "Plaintiff" shall mean the United States.

m. "Section" shall mean a portion of this Consent Decree identified by a roman numeral.

n. "Settling Defendants" shall mean Akzo Coatings, Inc. and The O'Brien Corporation.

o. "Site" shall mean the Fisher-Calo Superfund site in La Porte, Indiana.

p. "United States" shall mean the United States of America, including its departments, agencies and instrumentalities.

V. REIMBURSEMENT OF RESPONSE COSTS

4. Payment of Past Response Costs to the EPA Hazardous Substance Superfund. Within 30 days of entry of this Consent Decree, Settling Defendants shall pay to the EPA Hazardous Substance Superfund \$925,000 in reimbursement of Past Response Costs. Payment shall be made by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice account in accordance with current EFT procedures, referencing USAO File Number 1992V01144, the EPA Region Site Spill ID Number 0513, and DOJ Case Number 90-11-2-549A. Payment shall be made in accordance with instructions provided to Settling Defendants by the Financial Litigation Unit of the U.S. Attorney's Office in the Northern District of Indiana following lodging of the Consent

Decree. Any payments received by the Department of Justice after 4:00 p.m. Eastern Time shall be credited on the next business day. Settling Defendants shall send notice to EPA and DOJ that payment has been made in accordance with Section X (Notices and Submissions). Each written notice shall include the amount paid, and shall identify the USAO File Number, Site Spill ID Number, and DOJ case number referenced above.

VI. FAILURE TO COMPLY WITH REQUIREMENTS OF CONSENT DECREE

5. Interest on Late Payments. In the event that any payment required by Section V (Reimbursement of Response Costs) or Section VI, Paragraph 6 (Stipulated Penalty), is not received when due, Interest shall accrue on the unpaid balance through the date of payment.

6. Stipulated Penalty.

a. If any amounts due to EPA under this Consent Decree are not paid by the required date, Settling Defendants shall pay to EPA as a stipulated penalty, in addition to the Interest required by Paragraph 5, \$500.00 per violation per day that such payment is late.

b. Stipulated penalties are due and payable within 30 days of the date of the demand for payment of the penalties by EPA. All payments to EPA under this Paragraph shall be made by certified or cashier's check made payable to "EPA Hazardous Substance Superfund" and shall be sent to:

U.S. EPA Region V
ATTN: Superfund Accounting
P.O. Box 70753
Chicago, IL 60673.

All payments shall indicate that the payment is for stipulated penalties and shall reference the name and address of the party

making payment, the EPA Region Site Spill ID Number 0513, USAO File Number 1992V01144, and DOJ Case Number 90-11-2-549A. Copies of the check[s] paid pursuant to this Paragraph, and any accompanying transmittal letter[s], shall be sent to EPA and DOJ as provided in Section X (Notices and Submissions).

c. Penalties shall accrue as provided in this Paragraph regardless of whether EPA has notified Settling Defendants of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of correction of the noncompliance or completion of the activity. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

7. If the United States brings an action to enforce this Consent Decree, Settling Defendants shall reimburse the United States for all costs of such action, including but not limited to costs of attorney time.

8. Payments made under Paragraphs 5-7 shall be in addition to any other remedies or sanctions available to Plaintiff by virtue of Settling Defendants' failure to comply with the requirements of this Consent Decree.

9. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Consent Decree.

VII. COVENANT NOT TO SUE BY PLAINTIFF

10. Covenant Not to Sue by United States. Except as specifically provided in Paragraph 11 (Reservation of Rights by United States), the United States covenants not to sue Settling Defendants pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), to recover Past Response Costs. This covenant not to sue shall take effect upon receipt by EPA of all payments required by Section V, Paragraph 4 (Payment of Past Response Costs to the United States) and Section VI, Paragraphs 5 (Interests on Late Payments) and 6(a) (Stipulated Penalty for Late Payment). This covenant not to sue is conditioned upon the satisfactory performance by Settling Defendants of their obligations under this Consent Decree. This covenant not to sue extends only to Settling Defendants and does not extend to any other person.

11. Reservation of Rights by United States. The covenant not to sue set forth in Paragraph 10 does not pertain to any matters other than those expressly specified therein. The United States reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendants with respect to all other matters, including but not limited to:

a. liability for failure of Settling Defendants to meet a requirement of this Consent Decree;

b. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resources damage assessments;

c. criminal liability;

d. liability for injunctive relief or administrative order enforcement under Section 106 of CERCLA, 42 U.S.C. § 6906;

and

e. liability for costs incurred or to be incurred by the United States that are not within the definition of Past Response Costs.

VIII. COVENANT NOT TO SUE BY SETTLING DEFENDANTS

12. Settling Defendants covenant not to sue and agree not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to Past Response Costs or this Consent Decree, including but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of response actions at the Site for which the Past Response Costs were incurred; and

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to Past Response Costs.

13. Nothing in this Consent Decree shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

IX. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

14. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this Consent Decree may have under applicable

law. Each of the Parties expressly reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action that each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

15. The Parties agree, and by entering this Consent Decree this Court finds, that Settling Defendants are entitled, as of the effective date of this Consent Decree, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), for "matters addressed" in this Consent Decree. The "matters addressed" in this Consent Decree are Past Response Costs.

16. Each Settling Defendant agrees that, with respect to any suit or claim for contribution brought by it for matters related to this Consent Decree, it will notify EPA and DOJ in writing no later than 60 days prior to the initiation of such suit or claim. Each Settling Defendant also agrees that, with respect to any suit or claim for contribution brought against it for matters related to this Consent Decree, it will notify EPA and DOJ in writing within 10 days of service of the complaint or claim upon it. In addition, each Settling Defendant shall notify EPA and DOJ within 10 days of service or receipt of any order from a court setting a case for trial, for matters related to this Consent Decree.

17. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other relief relating to this Site, the Settling Defendants shall not assert, and may not maintain, any

defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in subsequent proceedings were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the Covenant Not to Sue by Plaintiff set forth in Section VII.

X. NOTICES AND SUBMISSIONS

18. Whenever, under the terms of this Consent Decree, notice is required to be given or a document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, EPA, DOJ, and Settling Defendants, respectively.

As to the United States:

DOJ

Chief, Environmental Enforcement Section
Environmental and Natural Resources Division
U.S. Department of Justice (DJ# 90-11-3-06360)
P.O. Box 7611
Washington, DC 20044-7611

EPA

Regional Counsel
ATTN: Fisher-Calo Site
U.S. Environmental Protection Agency
77 West Jackson Boulevard
Chicago, IL 60604

Director, Superfund Division
Remedial Project Manager
ATTN: Fisher-Calo Site
U.S. Environmental Protection Agency
77 West Jackson Boulevard

Chicago, IL 60604

As to Settling Defendants

Gary R. Letcher
Environmental Counsel
4910 Massachusetts Ave. NW #221
Washington, DC 20016

XI. RETENTION OF JURISDICTION

19. This Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree.

XII. INTEGRATION

20. This Consent Decree constitutes the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Consent Decree. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree.

XIII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

21. This Consent Decree shall be lodged with the Court for a period of not less than 30 days for public notice and comment. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper, or inadequate. Settling Defendants consent to the entry of this Consent Decree without further notice.

22. If for any reason this Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any party and the terms of the

agreement may not be used as evidence in any litigation between the Parties.

XIV. EFFECTIVE DATE

23. The effective date of this Consent Decree shall be the date upon which it is entered by the Court.

XV. SIGNATORIES/SERVICE

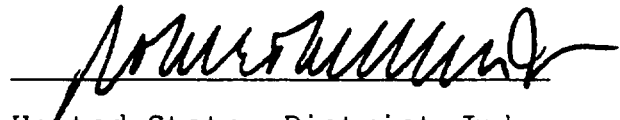
24. Each undersigned representative of a Settling Defendant to this Consent Decree and the Chief, Environmental Enforcement Section for the Environment and Natural Resources Division of the United States Department of Justice certifies that he or she is authorized to enter into the terms and conditions of this Consent Decree and to execute and bind legally such Party to this document.

25. The Settling Defendants hereby agree not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree, unless the United States has notified Settling Defendants in writing that it no longer supports entry of the Consent Decree.

26. The Settling Defendants shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on behalf of that Party with respect to all matters arising under or relating to this Consent Decree. Settling Defendants hereby agree to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil

Procedure and any applicable local rules of this Court, including but not limited to, service of a summons.

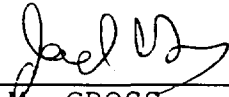
SO ORDERED THIS 18 DAY OF March, 1999.


United States District Judge

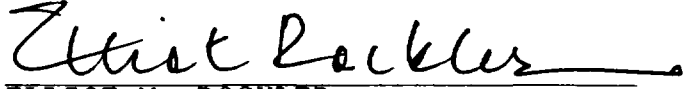
THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. David B. Fisher, et al., Civil No. S92-00636M (N.D. Ind.), relating to the Fisher-Calo Superfund Site.

FOR THE UNITED STATES OF AMERICA

Date: 1-15-91

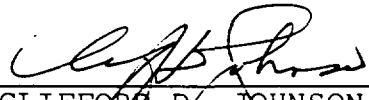


JOEL M. GROSS
Chief
Environmental Enforcement Section
Environment and Natural Resources
Division
U.S. Department of Justice
Washington, D.C. 20530



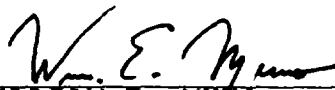
ELLIOT M. ROCKLER
Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources
Division
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044-7611
(202) 514-2653

JON E. DeGUILIO
United States Attorney
Northern District of Indiana

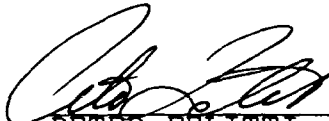
By: 

CLIFFORD D. JOHNSON
Assistant United States Attorney
MO-1 Federal Building
204 South Main Street
South Bend, Indiana 46601-2191
(219) 236-8287

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY



WILLIAM E. MUNO
Director of Superfund Division
U.S. Environmental Protection
Agency, Region V
77 West Jackson Boulevard
Chicago, IL 60604



PETER FELITTI
Assistant Regional Counsel
U.S. Environmental Protection
Agency, Region V
77 West Jackson Boulevard
Chicago, IL 60604

FISHER-CALO


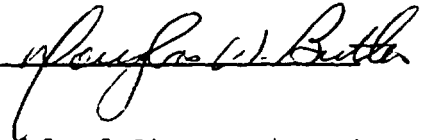
THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. David B. Fisher, et al., Civil No. S92-00636M (N.D. Ind.), relating to the Fisher-Calo Superfund Site.

FOR DEFENDANT
Akzo Coatings, Inc.

Date: 17 Dec 98

Terrance R. Francek - Vice President Finance

Douglas W. Butler - Senior Environmental Affairs Mg


VP Finance 

Agent Authorized to Accept Service on Behalf of Above-signed
Party:

Name: Douglas W. Butler
Title: Senior Environmental Affairs Manager
Address: Akzo Nobel Coatings Inc.
4730 Crittenden Drive
Louisville, KY 40209

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. David B. Fisher, et al., Civil No. S92-00636M (N.D. Ind.), relating to the Fisher-Calo Superfund Site.

Date:

12/17/98

FOR DEFENDANT
The O'Brien Corporation

James O'Brien
President

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name:

GARY R. LETCHER

Title:

Address:

ENVIRONMENTAL COUNSEL

4910 MASSACHUSETTS AVE NW # 221
WASHINGTON, DC 20016